In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1461

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 8a) is reported at 307 F. Supp. 417. The opinion of the court of appeals (Pet. App. 1a) is reported at 435 F. 2d 339.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1970. The petition for a writ of certiorari was filed on March 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether Section 3 Second of the Railway Labor Act, 45 U.S.C. (Supp. V) 153 Second, entitles a railroad to the creation of a Special Board of Adjustment where the grievance of an individual employee, being processed without the aid of a union, has been pending before the National Railroad Adjustment Board for more than one year.

Statement

In October 1964, petitioner Chicago, Rock Island and Pacific Railroad Company discharged Eugene E. Wells from his job as conductor. Wells asked the Order of Railway Conductors and Brakemen (the Conductors), of which he was a member, to process his grievance rather than the Brotherhood of Railroad Trainmen (the Trainmen), which served as collective bargaining representative for Rock Island conductors (Pet. App. 2a). When Wells later became dissatisfied with the handling of his grievance, he hired a private attorney to represent him in place of the Conductors (*id.*). On October 30, 1967, the attorney filed a submission with the First Division of the National Railroad Adjustment Board (NRAB), seeking to have Wells reinstated with seniority rights unimpaired and with full pay for time lost (*id.*). Thus far, the First Division has refused to accept Rock Island's allegedly untimely response to Wells' submission, and has not yet rendered an award.

In November 1968, the Railroad asked Wells and the Trainmen to agree to the Railroad's request for

the establishment of a Special Board of Adjustment under Section 3 Second of the Railway Labor Act, 45 U.S.C. (Supp. V) 153 Second. After Wells and the Trainmen refused, the Railroad requested the National Mediation Board to designate a partisan member to serve for the Trainmen on such a Special Board, despite the fact that the Trainmen were not representing Wells. The National Mediation Board denied the request, and the Railroad filed an action in the nature of mandamus to compel the National Mediation Board to appoint a partisan member to serve on a Special Board of Adjustment (Pet. App. 2a-3a).

The court of appeals affirmed the district court's summary judgment refusing to compel the appointment on the ground that Special Boards can be invoked under Section 3 Second, only for resolving disputes involving carriers and unions, not carriers and individual employees acting on their own behalf (Pet. App. 1a-7a).

Argument

In cases that have been pending before the NRAB for twelve months or more, Section 3 Second authorizes the creation of a Special Board of Adjustment if written request is made upon a carrier by "the representative of any craft or class of employees of such carrier," or "upon any such representative" by the carrier. Under that section an individual employee not represented by a union in a grievance proceeding cannot require the carrier to agree to a Special Board

of Adjustment.[1] Similarly, as the National Mediation Board and both courts below correctly concluded,[2] there is nothing in Section 3 Second that entitles a carrier to force an employee not represented by a union to have his grievance determined by a Special Board.

Petitioner argues that it is a carrier within the meaning of Section 3 Second, that the Trainmen is "any" representative of a craft or class of employees of the Railroad, and that it is therefore entitled to demand that the National Mediation Board designate a Special Board member on behalf of the Trainmen. The terms of Section 3 Second, however, make plain that the "representative of any craft or class" of the carrier, on whose behalf a partisan member may be appointed, must be one that is in fact representing the employee involved in the grievance proceeding. The section provides that a Special Board "shall consist of one person designated by the carrier and one person designated by the *representative of the employees*" (emphasis added). The section further calls upon the National Mediation Board to appoint partisan members "associated in interest with the carrier or *representative he is to represent*" (emphasis added). The statute thus contemplates disputes in which the union has an interest that the union partisan can "represent," not disputes

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[1] *Brotherhood of Locomotive Eng.* v. *Denver & R.G.W.R. Co.*, 411 F. 2d 1115, 1117-1118 (C.A. 10); *Antoniol* v. *Lehigh Coal and Navigation Company*, 47 F.R.D.198, 201 (E.D. Pa.).

[2] The Board's interpretation is, of course, entitled to "great deference," *Udall* v. *Tallman*, 380 U.S. 1, 16, quoting *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 153.

such as this one where the employee has chosen a non-union representative and where the union (the Trainmen) has disclaimed any interest. To be sure, a Special Board can be created if a request is served by or upon the representatives of "any craft or class of employees" of the carrier. But this merely insures that the employee may be represented by a union other than the representative of his craft or class. See *Brotherhood of Locomotive Eng.* v. *Denver & R.G.W.R. Co.*, 411 F. 2d 1115, 1117-1118 (C.A. 10). It does not follow that a carrier can demand that a person be appointed to a Special Board to act on "behalf" of a union that is not the representative of the employee in the grievance proceeding.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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